

Letter from the European Ombudsman inviting the European Commission to submit an opinion on complaints 1853/2013/TN and 2077/2012/TN

Correspondence - 28/11/2013

Case 1853/2013/TN - **Opened on** 28/11/2013 - **Recommendation on** 22/09/2014 - **Decision on** 09/09/2016 - **Institution concerned** European Commission (Recommendation partly agreed by the institution) |

Mr José Manuel Barroso President European Commission 1049 BRUSSELS BELGIQUE

Strasbourg, 28/11/2013

Complaint 2077/2012/TN and complaint 1853/2013/TN

Dear Mr President,

On 1 February 2013, arising from a complaint, the Ombudsman opened an inquiry into how the Commission deals with conflicts of interest - real, apparent or potential - that may arise when staff leave or join the Commission (complaint 2077/2012/TN).

I commend the manner in which the Commission and its services have facilitated the inquiry and in particular the inspection of the Commission's files [1] . The inspection found that the Commission is fully aware of the importance of this issue.

I now invite the Commission to submit an opinion on the complainant's allegation and claims, in accordance with Articles 2(2) and 3(1) of the Statute of the European Ombudsman.

Allegation:

The Commission fails to implement adequately the rules applicable to the "revolving doors phenomenon" and thereby allows real, apparent and potential conflicts of interest to occur.

Claims:

The Commission should:



- (1) Develop proactive procedures to inform staff about their obligations;
- (2) Define properly the terminology it uses;
- (3) Improve its scrutiny and decision making in respect of relevant authorisations;
- (4) Take action when the Joint Committee, referred to in Article 16 of the Staff Regulations, raise concerns;
- (5) Make better use of sanctions and referrals to the IDOC in cases of clear breaches of the rules;
- (6) Keep full and proper records of conflict of interest and revolving door cases, including through a central register;
- (7) Be proactively transparent about revolving doors cases and sabbaticals involving new activities;
- (8) Draw inspiration from UK parliamentary recommendations to overhaul the revolving doors rules;
- (9) Allow for greater transparency in its dealing with requests for public access in this area.

In support of their allegation and claims, the complainants argue that the Commission:

- (1) Does not properly inform staff about their obligations under the applicable rules;
- (2) Does not ensure that staff comply with their obligations;
- (3) Does not impose sanctions in cases of serious breaches of obligations;
- (4) Fails to ensure that it has gathered all the relevant information when assessing cases;
- (5) Does not adequately scrutinise applications, made by outgoing staff under Article 16 of the Staff Regulations, for risks of conflict of interest;
- (6) Does not adequately scrutinise incoming and current staff for risks of conflict of interest;
- (7) Does not keep adequate records of assessed cases;
- (8) Does not implement properly the rules regarding sabbaticals;
- (9) Does not have an adequate definition to determine when contract agents should be covered by the rules.



The Ombudsman would like the Commission also to address the questions set out below. Please consider, where relevant, contractual agents and staff who are on leave on personal grounds.

1) The procedures

Please detail the Commission's procedures in respect of its handling of possible conflicts of interest related to inward and outward staff movements, including the evolution of these procedures over time.

2) Documentation of steps followed

It was not immediately evident, from the inspected files, that the full procedures have been followed in every case. Please explain how the Commission verifies that all steps are followed and documented in every case and whether it plans to introduce additional checks.

3) Centralised register

Would the Commission establish a centralised register of staff applications to engage in an outside activity during leave on personal grounds, or in an occupational activity after leaving the service? Would it include the assessments of possible conflicts of interest of those taking up positions in the Commission?

4) Reasoning of approvals

The inspection revealed that while negative decisions are usually accompanied by extensive reasoning there is usually little, if any, reasoning to support positive decisions. Clearly, positive decisions will not be challenged by the official concerned, however the general public has an interest in ensuring that the rules on conflicts of interest are properly applied. Approval decisions should be equally well-reasoned.

The decisions should detail the tasks carried out by the official in the Commission, the tasks to be carried out in the new activity and explain why there are no conflicts of interest. They should also reference the opinions of the DG or DGs where the staff member worked, the Legal Service, the Secretariat General and any other inputs taken into account.

If the Commission chooses not to follow the opinions or expressed reservations, it should explicitly explain why not. This is particularly important if the negative opinion or reservations come from a DG where the official worked.

Is the Commission ready to ensure that future positive decisions are supported by reasoning as



set out above?

5) Clarifications from applicants

The Commission cannot deal properly with a request for authorisation unless the request contains all the necessary information. If the official is asked for additional information, the request and the response should form part of the relevant file. If no additional information is requested from the official, the Commission should say so explicitly in the authorisation decision, and demonstrate how the decision is nonetheless well-founded.

Could the Commission please comment on this proposal?

6) 'Self imposed conditions'

Some files show that the former staff member is aware of possible conflicts of interest by stating, for instance, that he/she will not work on projects in which he/she has been involved in deciding on EU funding. The Commission should always include such 'self imposed conditions' in its authorisation.

Could the Commission please comment on this proposal?

7) Time-limit for imposing conditions or forbidding activity

The Commission seems to interpret the two-year period within which former staff members are obliged to inform it about new occupational activities as meaning that it is only within this two-year period that it can forbid the activity or impose conditions on it. The Ombudsman's preliminary view is that this is not correct. The first paragraph of Article 16 of the Staff Regulations, which obliges former staff members to continue to behave with integrity and discretion as regards the acceptance of appointments, is not limited in time. Accordingly, the Commission could prohibit or impose conditions on, activities beyond two years, provided there is good reason to do so and the impact on the former staff member is not disproportionate.

Could the Commission please give its view on this matter? In doing so, please also address the changes in the Staff Regulations that will come into effect on 1 January 2014, in particular the "twelve months" mentioned in the new paragraph 3 of Article 16.

8) Independence of assessment

The system for assessing cases of possible conflicts of interest could be vulnerable to criticism because, particularly as regards senior staff, it may be based on opinions from people with



whom they have worked closely. At present, there does not appear to be any system for ensuring that the assessment of senior staff files is carried out by services unconnected with the DG concerned.

At Member State level, the Ombudsman is aware of at least one example of an independent external committee deciding on applications from senior staff to engage in occupational activities after leaving the service.

Would the Commission consider the introduction of measures that would allow for the evaluation of senior staff applications by people other than those with whom they have closely worked?

9) Asymmetry in substantive assessment of cases - conditions

The files showed unexplained variations in the formulation of conditions. In some cases, the former staff member was prohibited from doing work related to *all cases* he/she had dealt with in the Commission. In others, the condition concerned cases dealt with during the *past X number of years* or *open cases*.

Could the Commission comment on the policy underpinning and rationale for these variations?

10) Code on Ethics and Integrity - identifying files, the distance rule and contacts with colleagues having left the Commission

During the inspection, the Ombudsman's services were provided with a copy of the Code on Ethics and Integrity produced by DG Competition for its staff. Of note are:

- the requirement to identify particular files on which former staff should not work in a new occupation after leaving the Commission;
- the rule ("distance rule") that a former staff member may not participate in meetings or have other contacts of a professional nature with his or her former DG or service for a defined period (one year for those who occupied a management function; six months in other cases);
- the general requirement that current members of staff inform their superiors, for risk assessment, of potential participation in meetings with former members of management.

Do similar Codes for other DGs exist? If not, would the Commission use the DG Competition Code or similar as a benchmark?



11) When learning about new occupational activity from a source other than the official concerned

Please explain how the Commission deals with cases when it receives information that a former staff member has taken up new occupational activity without having requested permission to do so. Is there a standard procedure for dealing with such cases? In particular, does the Commission systematically contact the former staff member concerned?

12) Changes to the Staff Regulations

Changes to the Staff Regulations come into force on 1 January 2014, Please explain how the Commission intends to implement the more detailed provisions on conflicts of interest issues (Articles 11 and 16 of the Staff Regulations), particularly in respect of the analysis to be carried out as regards incoming staff.

13) Transparency

The changes to the Staff Regulations include an obligation to publish information, "*including a list of the cases assessed*", about the implementation of the new rule that former senior officials shall, in principle, be prohibited, during the twelve months after leaving the service, from engaging in lobbying or advocacy vis-à-vis staff of their former institution on matters for which they were responsible during the last three years in service (new paragraph 3 of Article 16 of the Staff Regulations).

In the Ombudsman's understanding, this provision must necessarily be closely linked to the application that a former member of staff has to make if wishing to engage in an occupational activity within two years of leaving the service (existing paragraph 2 of Article 16).

Given the Commission's commitment to improving transparency and accountability, would it publish online regularly its assessment of *all* applications to engage in occupational activity after leaving the service, or during leave on personal grounds, made by senior officials (Director level and above and Heads of Cabinet)?

14) Contract staff with access to sensitive information

Please explain the Commission's procedure for determining what constitutes 'sensitive information', access to which requires former contract staff to ask for authorisation to carry out a new occupational activity?

15) Sanctions



Please indicate how many disciplinary proceedings were (i) opened and (ii) completed in 2010, 2011 and 2012 relating to non-compliance with the provisions relating to occupational activities after leaving service or during leave on personal grounds? For each year, in how many cases were sanctions imposed? What sanctions were imposed, if any?

Please provide aggregate information only, and in a form that avoids the possible identification of individuals.

16) Temporary agents and contractual staff

Officials who leave the service and breach their conflict of interests obligations could be subject to disciplinary proceedings. Possible sanctions include loss of pension rights. Temporary staff (including special advisors) and contractual staff may not have any EU pension rights when they leave the service.

Please detail the measures the Commission could take to prevent such staff taking up employment opportunities that give rise to conflicts of interests?

New complaint 1853/2013/TN

On 27 September 2013, I received a complaint from the Friends of the Earth Europe against the European Commission concerning the handling of potential conflict of interest issues in respect of a former staff member.

As this new case raises issues similar to those dealt with in the context of the inquiry into case 2077/2012/TN, I have decided to join the two cases.

Allegations:

1. The Commission failed to ensure that staff leaving its services apply for authorisation to engage in new occupational activity; and
2. The Commission failed to impose restrictions on a particular staff member leaving the Commission to engage in new occupational activity.

Claim:

The Commission should recognise that Article 16 of the Staff Regulations was not properly implemented in respect of the former staff member concerned and take measures to ensure that there is no conflict of interest between his new position and his responsibilities while he was employed by the Commission. In particular, the Commission should introduce restrictions to prevent him from using his contacts and insider knowledge in the Commission in the context of his new employment and for the benefits of his new employer.



I would like the Commission to provide me with a joint opinion on complaints 2077/2012/TN and 1853/2013/TN, as well as a response to the 16 points made above by 28 February 2014. Please note that the opinion will be forwarded to the complainants for possible observations and that I may decide to publish it on my website.

I have also concluded that it would be appropriate, parallel to the Commission preparing its opinion, to inspect the documents related to complaint 1853/2013/TN.

I therefore ask, in accordance with Article 3(2) of the Statute of the European Ombudsman, that you allow my services to inspect the relevant file. I should be grateful if your services could contact Ms Tina Nilsson (tel. +32 (0)2 284 14 17) of my Office in order to agree on a convenient date for the inspection of the documents.

Please also note that I may wish to carry out a further inspection of the Commission's files on the basis of the opinion.

When the Ombudsman received complaint 2077/2012/TN, the Ombudsman decided to declare it confidential. Following the inspection of the files I find that this is no longer necessary. Conflict of interest issues are of significant public interest and I will from now on deal with the present case publicly including publishing this letter on my website. The complainants will also receive a copy of this letter.

However, in accordance with the Ombudsman's Statute and Implementing provisions, the *inspected documents*, identified as confidential by the Commission, will remain confidential. [2] Any further release of documents related to the present inquiry will be done in accordance with the Ombudsman's rules on public access [3], ensuring the protection, in particular, of personal data.

Enclosed, please find a copy of complaint 1853/2013/TN.

Yours sincerely,

Emily O'Reilly

Enclosure (sent by e-mail):

- Copy of complaint 1853/2013/TN

[1] The Ombudsman's services initiated the inquiry by carrying out an in-depth inspection of the Commission's files. During the inspection, the Commission first explained its procedures for dealing with possible conflicts of interest in respect of outgoing and incoming staff. The Ombudsman's services then went on to inspect a number of files on individual cases, namely, 1) those identified by the complainants; 2) a number of cases chosen by the Commission to show the evolution of its handling of cases between 2010-2012; and 3) a number of cases from the period 2010-2012, randomly chosen by the Ombudsman's services.



[2] Article 4.1 of the Statute (www.ombudsman.europa.eu/resources/statute.faces) and Articles 5.2, 13.3(a), 14.2(a) of the Implementing provisions (www.ombudsman.europa.eu/resources/provisions.faces)

[3] Article 14 of the Implementing provisions (www.ombudsman.europa.eu/resources/provisions.faces)